

Sultan
Constitutional Law I
Spring 1995

One of the easiest items to enact in the Republican's "Contract with America" was the "Line Item Veto." Eagerly sought by a long succession of presidents of both major political parties, it grants the president the power to selectively eliminate individual items (or projects) in massive spending bills.

On February 6, 1995, shortly after the present congress convened, the legislation passed the House by a vote of 294-136. Shortly thereafter it passed the Senate, and was swiftly signed into law by President Clinton, who said during the signing ceremony, "I can now take further steps to cut the deficit by helping to control congressional pork-barrel spending that helps only individual areas or interests."

Under the provisions of this new legislation, any multi-part spending bill approved by both houses is to be broken into smaller bills, each one containing a single appropriation; then both houses vote a second time --on the entire package of legislative pieces. Only then is the legislation sent to a president. Should the president veto any piece or pieces of the package, a two-thirds majority in both houses can override his veto or vetoes.

Shortly after the bill is passed, a number of "special interest" groups that had benefitted from the previous situation came together and formed an association calling itself "Perserve our Republican Constitution" (PORC) for the specific purpose of challenging the constitutionality of the new legislation. One month after its founding, they file suit in the United States District Court for the District of Columbia under the Federal Declaratory Judgment Act seeking an injunction against implementation of the act by the congress and President Clinton.

A recent graduate of the University of Dayton School of Law, you are one of two clerks to the federal judge assigned the case. He informs you that he has assigned his other clerk research in all aspects or questions of jurisdiction in PORC's lawsuit, and wants you **only** to research the constitutionality of the across the following items:

1. U.S. Constitution, Art. I:

Section I. All legislative Powers herein granted shall be vested in a Congress

of the United States which shall consist of a Senate and House of Representatives.

Section II.("Presentment Clauses")

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively....

2. Farber and Sherry, A History of the American Constitution (1990), pp. 104-5, (Author's text and debates of the Constitutional Convention on Monday, June 4, 1787):

A. Text (of Farber and Sherry)

Only one executive power gave the delegates much difficulty: the executive veto. Since the advisability of an executive veto depended more on the delegates' views of legislative competence than on the mode of electing the president, the question of an executive veto arose early in the convention.... On June 4, the convention voted...to take up ...Gerry's (Elbridge Gerry of Massachusetts) proposal that "the National Executive shall have a right to negative any Legislative act which shall not be afterwards passed by _____ parts of each branch of the national Legislature." Wilson (James Wilson of Pennsylvania) and Hamilton (Alexander Hamilton of New York) immediately moved to delete the last portion of Gerry's proposal, and leave the executive with an absolute veto that could not be overridden by the legislature.

B. Debate (in the Constitutional Convention)

It was mentioned by Col. Hamilton (Alexander Hamilton of New York) that the King of Great Britain had not exerted his negative since the Revolution.

Mr. Gerry sees no necessity for so great a control over the legislature as the

best men in the community would be comprised in the two branches of it.

Mr. Franklin (Benjamin Franklin of Pennsylvania), said he was sorry to differ from his colleague for whom he had a very great respect, on any occasion, but he could not help it on this. He had had some experience of this check in the Executive on the Legislature, under the propriety Government of Pennsylvania. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter....

Mr. Sherman (Roger Sherman of Connecticut) was against enabling any one man to stop the will of the whole. No one man could be found so far above all the rest in wisdom. He thought we ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature.

Mr. Madison (James Madison of Virginia) supposed that if a proper proportion of each branch should be required to overrule the objections of the Executive, it would answer the same purpose as an absolute negative veto. It would rarely if ever happen that the Executive constituted as ours is proposed to be would, have firmness enough to resist the legislature, unless backed by a certain part of the body itself. The King of Great Britain with all his splendid attributes would not be able to withstand the unanimous and eager wishes of both houses of Parliament. To give such a prerogative would certainly be obnoxious to the temper of this Country; its present temper at least.

Mr. Wilson (James Wilson of Pennsylvania) believed **as others did that** this power would seldom be used. The legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat. Its silent operation would therefore **preserve harmony and** prevent mischief. The case of Pennsylvania formerly was very different from its present case. The Executive was not then as now to be appointed by the people.... The requiring a large proportion of each House to overrule the Executive check might do in peaceable times; but there might be tempestuous moments in which animosities may run high between the Executive and legislative branches, and in which the former ought to be able to defend itself.

C. Text

Franklin then made a long speech opposing the Wilson and Hamilton motion. He studded it with historical illustrations, and noted: "The first man put at the helm will be a good one. No body knows what sort may come afterwards." Every delegate probably agreed with at least part of Franklin's assessment, for it was commonly assumed that George Washington would

be the first president.

The delegates then voted to reject an absolute veto. Madison's notes indicate only that the states were unanimous in their rejection, but King's (Rufus King of Massachusetts) notes (of the debates) show that there were three individual supporters of the absolute veto (and thus of an especially strong executive): himself, Wilson, and Hamilton.

Gerry's limited executive veto was then passed... and the convention unanimously agreed on a two thirds majority of each house as the proportion necessary to override the veto. The resolutions adopted by the Committee of the Whole and presented to the Convention accordingly provided:

10. Resolved that the national executive shall have a right to negative any legislative act; which shall not be afterwards passed unless by two third parts of each branch of the national legislature.

3. Judicial Decisions

A. Field v. Clark, 143 U.S. 649,669-73 (1892):

the "respect due to coequal and independent departments" requires a conclusive presumption that an enrolled bill passed both houses of Congress if the houses attest to that fact.

B. INS v. Chadha, 462 US 919, 951 (1982):

"We see therefore that the Framers were acutely conscious that the bicameral requirement (two chamber legislature) and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The president's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. It emerges clearly that the prescription for legislative action in Art. I. §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."

(*Both House and Senate must pass Bills.)

Write a memo for your Judge evaluating the Line-Item Veto Bill,

- A. Presenting both sides,
- B. Deciding on its constitutionality, AND
- C. Giving your reasons for your decision.